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December 18, 2015

VIA E-MAIL (kcollins@fcc.gov)

Daniel Petalas
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20436

Re: MUR 6989 Penguin Random House LLC d.b.a. Sentinel

Dear Mr. Petalas:

On behalf of Sentinel, an imprint of Penguin Random House LLC, ("Publisher"), the undersigned counsel hereby responds to the Complaint filed with the Federal Election Commission ("FEC" or "Commission") by the American Democracy Legal Fund ("ADLF"). For the reasons stated below, we respectfully request that the Commission find no reason to believe that the Publisher has violated any provision of the Federal Election Campaign Act of 1971 (the "Act") or the Commission's regulations promulgated thereunder, and dismiss the case as soon as possible.

The Complaint is unclear as to how a commercial entity promoting its publication has run afoul of the Act but it appears to allege that through the book tour to promote Dr. Ben Carson's book *A More Perfect Union: What We the People Can Do to Reclaim Our Constitutional Liberties* (the "Book"), the Publisher made a prohibited corporate in-kind contribution to Dr. Carson's presidential campaign. The Complaint states that during the book tour, Dr. Carson "has continued to discuss his candidacy and tout his plans for the country if he is elected President while attending promotional events such as a National Press Club Luncheon held on October 9, 2015 and during cable television programs." Complaint at 2. The Complaint also alleges that Dr. Carson accepted a \$500 campaign contribution during a book tour event and then vaguely refers to "sandwiched campaign events between promotional book tour events" without offering any evidence to substantiate the claim. *Id.* at 3. These allegations, however, are factually and legally unfounded.

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Introduction

Penguin Random House LLC is the world's largest English-language general trade book publisher. The company comprises many publishing groups and their imprints, which publish fiction and nonfiction, both original and reprints. The company employs more than 12,000 people globally and publishes 70,000 digital and 15,000 print titles annually, with more than 100,000 eBooks available worldwide. Sentinel, a dedicated conservative imprint within Publisher, publishes a wide variety of right-of-center books on subjects like politics, history, public policy, culture, religion, and international relations. Sentinel does not, however, endorse candidates for office. The Book was released on October 6, 2015 and ranked third on the New York Times Bestsellers list for the week ending October 24, 2015.¹

According to the official website, www.bencarsonbook.com, the Book is meant to "encourage every citizen to think about the Constitution and to help defend it from those who misinterpret and undermine it." The Book features Dr. Carson's "common-sense approach to the Constitution and to many of today's most controversial issues."² The Book does not discuss Dr. Carson's candidacy for President of the United States nor does it discuss the 2016 election. Rather, the book concentrates on Dr. Carson's personal views regarding the current status of the United States and is aimed directly at informing the public about a particular viewpoint that is a quintessential example of the exchange of ideas in the global marketplace. In connection with the promotion of the Book (the "book tour"), the Publisher organized and paid for a book tour covering 38 cities in 10 states as well as other promotional activities such as the costs incurred for the official website, the tour bus and Dr. Carson's travel related expenses.

1. The Complaint must be dismissed because is activities surrounding the book tour are bona fide commercial activity and thus fall outside the purview of the Act and Commission regulations.

The promotion of the Book is not an attempt by the Publisher to impermissibly influence an election. Rather, the Publisher is, and has been for many years, in the business of publishing books on a variety of topics and issues and selling them to the general public. The Book and its

¹ <http://www.nytimes.com/best-sellers-books/2015-11-01/overview.html>

² <http://www.prnewswire.com/news-releases/dr-ben-carsons-forthcoming-book-out-october-6th-and-national-book-tour-300145449.html>

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commercial promotion to encourage consumers to purchase the Book fall outside the purview of the Act and Commission regulations. *See* AO 2006-7 (stating that “[t]he expenses associated with marketing a book that a commercial publisher has published...are expenses that exist irrespective of the candidate’s election campaign or duties as a holder of Federal office”). *See also* AO 2006-18 (holding that expenses marketing a book exist irrespective of a candidate’s campaign).

The Publisher organized and arranged the book tour to promote the Book, not Dr. Carson’s presidential aspirations. Dr. Carson and his literary agent, Sealy Yates, were specifically instructed that the appearances and interviews should be limited to discussions about the Book, not his campaign, and that if asked about his campaign, Dr. Carson should redirect the discussion to the Book. The Publisher structured the three week book tour with alternating weeks, one week for the book tour and one week off, to clearly identify when Dr. Carson was on “book tour time” and when he was on “campaign time.”³ During the weeks that Dr. Carson was on the book tour, the Publisher paid for all of his travel related expenses and controlled the schedule, leaving only small blocks of time unscheduled. Publisher arranged for interviews for Dr. Carson to promote the Book through online and print media as well as television and radio outlets. Contacts with Dr. Carson’s campaign were limited to logistical scheduling and campaign staff was not allowed to travel with Dr. Carson on the bus or to attend the book tour events. In fact, at the events, security was instructed to evict anyone handing out campaign materials or attempting to get contact information for customers waiting in line for the book signings. Furthermore, the Book’s promotional website made no mention of Dr. Carson’s candidacy—the site makes reference to his career as a pediatric neurosurgeon, his previously authored books, and his founding of the Carson Scholars Fund, among other accomplishments and personal information.⁴ At no point did the promotional activities paid for by the Publisher include references to Dr. Carson’s campaign or candidacy, and efforts were made to ensure that the tour bus and its related stops could not be confused as being campaign related.⁵ It is

³ Given the inability of the Commission to approve a response to the question of whether a candidate could host fundraising events in cities where the book publisher paid the candidate’s travel costs to promote the book, the Publisher decided to schedule the book tour with one week for the tour alternating with one week for the campaign, and so on. *See* Advisory Opinion (“AO”) 2011-02.

⁴ <http://www.bencarsonbook.com/bios/ben-carson-m-d>

⁵ For example, the tour bus unambiguously omits any mention of Dr. Carson’s campaign. The wrap on the bus features the same photo used on the book jacket cover, his name “Ben Carson, MD” and the Publisher’s website “bencarsonbook.com.” The Publisher scrapped the original design of the book jacket and paid for a second set of

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important to note that Dr. Carson's campaign did not promote the book tour on the campaign website even though the Commission has previously permitted such activities.⁶

Commission regulations contemplate that corporations may engage in *bona fide* commercial activity that is neither for the purpose of influencing any election for federal office nor in connection with any election, and thus not a contribution or expenditure subject to federal campaign finance laws. In determining whether activity is *bona fide* commercial activity, the Commission has considered the following factors, among others: (1) whether the sales of the merchandise involve fundraising activity or solicitations for political contributions; (2) whether the activity is engaged in by the vendor for genuinely commercial purposes and not for the purpose of influencing an election; (3) whether the items are sold at the vendor's usual and normal charge; and (4) whether the items purchased were purchased by individuals for their personal use in political expression. See AOs 1989-21, 1994-30.

Applying the same four factors identified in AO 1989-21 to the book tour and promotional activities, the Publisher clearly qualifies for the commercial activity exemption. See AO 2014-06 (stating that "[s]uch publication, promotion, and sale—especially as conducted by a 'long established and prominent publisher' that 'publishes a wide variety of different types of books, both political and non-political'—are genuine commercial activity on their face"). Specifically, none of the proceeds from sale of the Book have been given to any campaign or party; the Publisher has long been in the business of regularly producing, promoting and distributing books; and the actions undertaken by the Publisher in promoting the Book to the public were entirely consistent with its profit motive. The fact that Dr. Carson spoke about his campaign in the context of interviews by press outlets during the course of the book tour does not and should not disqualify the book tour from an appropriate exception to the corporate

photographs to be taken for the book jacket cover when it learned that the photograph the Publisher had licensed was being used on the campaign's website.

⁶ The Commission has determined that the *de minimis* use of a campaign's website for promotion of a book authored by a candidate is permissible provided the costs associated with such use are *de minimis*. See AO 2006-7 (permitting the use of a campaign website to include information on upcoming book signings and providing a link to Amazon.com to order a copy of the book where the website includes a substantial amount of campaign material), including a biography of the candidate, discussion of various issues, endorsements, news archives, schedules of upcoming campaign events, and similar material); AO 2011-02 (permitting the posting of a *de minimis* amount of material promoting the candidate's book and book tour on the website and social media of the campaign). The Commission has also permitted a campaign's website to include materials about a candidate's book that were limited to one or two sentences in length-- including hyperlinks directing reader's to the publisher's website or to an online book seller. See AOs 2011-02, 2014-06, and 2006-07.

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contribution prohibition. *See* MURS 5474 and 5339 (stating that “[a]n analysis of whether the feature-length film, movie trailers and Fahrenheit 911.com are bona fide commercial activity does not turn on their content”). To the contrary, the specific timing of the book tour to coincide with the Book’s release directly served the Publisher’s profit interests—the goal was to sell at least 500-1000 books at every event. Additionally, the Book was marketed to the public through normal distribution channels including through book signings and appearances at Barnes & Noble, Books-A-Million and other retail booksellers. No information has been presented to suggest that the Publisher failed to follow usual and normal business practices and industry standards when promoting the Book. Under the Commission’s own test, the promotion of the Book and the book tour are commercial activities.

2. The Complaint must be dismissed because the Publisher was acting within its legitimate press function when promoting the Book.

Even if the Commission were to find that the payment of the book tour by the Publisher constituted an in-kind contribution to the Carson campaign on the theory that Dr. Carson’s discussion about his campaign constituted express advocacy by the Publisher, the Act, Commission regulations and opinions and court rulings make clear that media companies such as the Publisher are exempt from certain provisions related to contributions and expenditures that would otherwise be prohibited. Media entities are permitted to air programs and commentary that contain express advocacy, provided they do so in furtherance of their press function. *See, e.g.,* 52 U.S.C. § 30101(9)(B)(i); 11 CFR §§ 100.73; 11 CFR § 100.132; AO 2004-30; *Reader’s Digest Ass’n Inc. v. FEC*, 509 F. Supp. 12010 (S.D.N.Y. 1981). The test for whether the media exemption covers the promotional activities of the Book is two-fold: first, the Commission must decide whether the Publisher of the Book qualifies as a press entity; and then, if the Publisher is determined to be a press entity that is not owned or controlled by any political party, political committee or candidate, the Commission must determine whether or not the Publisher acted as a press entity when promoting and distributing the Book (*i.e.*, whether the entity is acting in its “legitimate press function”). 11 CFR §§ 100.73; 100.132.

The Commission has applied the press exemption to entities as diverse as C-SPAN, Showtime, MTV and even Wal-Mart. *See* AOs 1996-48; 2003-34; 2004-7 and MUR 5315. The Publisher is regularly engaged in the business of producing and distributing books of all kinds and pays for the costs associated with promoting them.

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The Publisher clearly exercises a media function in publishing the commentary and editorial content of authors such as Dr. Carson. The promotion of the Book and its commentary and editorial fall squarely within the Publisher's legitimate press function and any interview conducted with Dr. Carson during the course of the book tour, even those where he goes beyond the commentary and editorial in the Book, would still fall under the umbrella of commentary and editorial for which the Publisher may legally pay the costs. Combined with the fact that the Publisher is not owned or controlled by any political party, political committee or candidate, there can be no doubt that the Publisher is entitled to the media exemption.

3. The Complaint must be dismissed because the remaining allegations lack merit.

As to the remaining allegations⁷ made in the Complaint that Dr. Carson accepted a \$500 campaign contribution at a book tour event; and that he sandwiched campaign events between book tour events, these allegations are lacking merit with respect to the Publisher's activities. While we do not represent Dr. Carson and his campaign may speak for itself, there were no solicitations for contributions made at the book signing events and the news story upon which ADLAF bases its complaint is ambiguous as to whether Dr. Carson knew that the envelope contained a contribution. One can hardly claim that the acceptance of an envelope without any solicitation, the contents of which presumably were unknown at the time of acceptance, would turn a book signing into a campaign event. Lastly, the Publisher has no knowledge of any campaign events being "sandwiched" in between book tour events. Publisher was not consulted about any such campaign events and if any such events were conducted, they would have been during the limited private time allotted to Dr. Carson. The Publisher did not otherwise incur any expenses or make accommodations for such events.

Conclusion

As discussed above, the Publisher did not violate the Act or Commission regulations when conducting commercial activities to promote Dr. Carson's book. In fact, the Publisher went above and beyond in adopting additional precautions such as alternating weeks for campaign activities and book tour activities, changing the jacket cover of the book, and instructing Dr. Carson and his agent about the restrictions on campaign activities during the tour to ensure that the book tour would not run afoul of the Act. However, should the Commission

⁷ With respect to the event at the National Press Club, the staff at the National Press Club determined the title for his presentation, not the Publisher.

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determine that these steps missed the mark, it is clear that the book tour is not subject to regulation by the Commission either because the promotional activities are *bona fide* commercial activities or because the activities are exempt under the media exemption.

For the foregoing reasons, the Commission should not take any further action against Penguin Random House or Sentinel and close this matter.

Respectfully submitted,



Melissa L. Laurenza
Partner

Attachment

cc: Kim Collins